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FILED
08/15/2023
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Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0899-R-2022
Lambert, Kathryn
10.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: Pioneer Ditch Co.

CASE 43B-0899-R-2022
43BJ 23172-00
43B 212247-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Pioneer Ditch Company claim 43B 23172-00 appeared in the Preliminary Decree with the following remarks:

CLAIM WAS IMPROPERLY DESIGNATED TO BASIN 43BJ AND WAS INCLUDED IN THE TEMPORARY PRELIMINARY DECREE ISSUED 04/03/1985 . CLAIM WAS NOT INCLUDED IN THE BASIN 43B TEMPORARY PRELIMINARY DECREE ISSUED 01/16/1985.

THE SOURCE, POINT OF DIVERSION AND MEANS OF DIVERSION HAVE BEEN CHANGED EVEN THOUGH NOT OBJECTED TO THEREFORE THEY WILL BE SUBJECT TO OBJECTIONS AT THE PRELIMINARY DECREE. THE TIMELY FILED OBJECTION OF PIONEER DITCH CO WAS AMENDED BY PIONEER DITCH CO TO INCLUDE SOURCE, POINTS OF DIVERSION, AND MEANS OF DIVERSION. BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

Pioneer Ditch Company claim 43B 212247-00 appeared in the Preliminary Decree with the following remarks:

THE TYPE OF HISTORICAL RIGHT IS MISSING.

THE SOURCE, POINT OF DIVERSION, AND MEANS OF DIVERSION HAVE BEEN CHANGED FROM THAT ORIGINALLY CLAIMED IN 43BJ 23172 AND WILL THEREFORE BE SUBJECT TO OBJECTION AT THE PRELIMINARY DECREE STAGE. THE TIMELY FILED OBJECTION OF PIONEER DITCH CO WAS AMENDED BY PIONEER DITCH CO TO INCLUDE POINT OF DIVERSION, MEANS OF DIVERSION, AND SOURCE. BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

THE SOURCE APPEARS TO BE WASTE AND SEEPAGE, UNNAMED TRIBUTARY OF YELLOWSTONE RIVER.

The issue remarks were not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

Under Section 85-2-248(3), MCA, information in the claim file or other information obtained by the Court can be reviewed to determine if it provides a sufficient basis to resolve the issue raised by a remark and the Court can provide the claimant an opportunity to file additional information or evidence. The claimant filed responses on March 2, 2023 and July 11, 2023. The July 13, 2023 Order Calling Claim In On Motion Of The Montana Water Court, Order Re-Consolidating Case, and Order Setting Filing Deadline states:

For both claims, a DRAFT Master's Report has been prepared and DRAFT abstracts modified for the claimant's review. As agreed at the July 11, 2023

scheduling conference, the Court will set a deadline for the claimant to file a response detailing any corrections or concerns, and if no response is filed, the Court will conclude the DRAFT Master's Report and DRAFT abstracts correctly describe the changes to be made to these two claims. Therefore, pursuant to section 85-2-248, MCA, it is

ORDERED that the deadline is **August 3, 2023** for the claimant to file its response to the attached DRAFT Master's Report and DRAFT abstracts. If no response is filed, the Court will conclude the claimant has determined that the DRAFT Master's Report and DRAFT abstracts correctly describe the changes to be made to these two claims.

No response was filed. These documents are viewable in the Court's FullCourt Enterprise case management system.

BACKGROUND

As recounted in the Pioneer Ditch Company response filed March 2, 2023, their stockwater claim 43BJ 23172-00 was filed for the water collected in Pioneer Ditch along its course. During the Basin 43BJ Temporary Preliminary Decree proceedings in Case 43BJ-24, it was determined that some of the points of diversions/places of use fell within the boundaries for Basin 43BJ (Boulder River) and others fell within the boundaries for Basin 43B (Yellowstone River). The 1988 Master's Report states that the claim should be divided into one claim for the portion in Basin 43BJ (retaining claim number claim 43BJ 23172-00) and a second claim generated for the portion in Basin 43B (implied claim 43B 212247-00). The points of diversion and places of use were supposed to be apportioned between the two claims BUT the abstracts were not correctly done. The points of diversion and places of use for the Basin 43B portion were added to both claims rather than apportioned, and the revised points of diversion and places of use for the Basin 43BJ portion were not added to the abstract for claim 43BJ 23172-00.

Then in 2018, the boundary between the two Basins was changed, placing all of the points of diversion and places of use on the abstracts of these two claims within the boundaries of Basin 43B. See the aerial photograph attached to the February 7, 2018 Memorandum from the Montana Department of Natural Resources and Conservation ["DNRC"]. The basin code for claim 43BJ 23172-00 was changed to 43B 23172-00. Now there were two identical 43B claims which include all of the points of diversion and places of use for the Basin 43B portion

and no claim for the Basin 43BJ portion.

The 2018 DNRC marked aerial photograph includes a stretch of Pioneer Ditch in section 23, a tiny bit in section 24, and a small portion in the SWSW section 13 falling within the current boundaries of Basin 43BJ. This stretch of Pioneer Ditch is not included in the points of diversion and places of use. This is the same portion included in the Statement of Claim and identified in the 1988 Master's Report as the portion for inclusion on the 43BJ claim. These portions are still within the boundaries of Basin 43BJ and the abstract for 43B 23172-00 should now be corrected to include the points of diversion and places of use as identified in the 1988 Master's Report and as depicted on the 2018 DNRC aerial photograph, and the Basin Code should be changed back to Basin 43BJ.

After scheduling conferences with the President and Vice-President of Pioneer Ditch Company discussing the convoluted history of how these claims were handled and how the abstracts should be modified, the claimant filed responses on March 2, 2023 and July 11, 2023. The claimant's final determination, with full agreement of this water master, is to go back to the intent of the 1988 Master's Report: modify the abstract of then claim 43BJ 23172-00 to represent only the portion of Pioneer Ditch flowing within the boundaries of Basin 43BJ and modify the abstract of implied claim 43B 212247-00 to represent only the portion of Pioneer Ditch flowing within the boundaries of Basin 43B.

APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. For claim 43B 23172-00, the Basin Code should be changed to 43BJ.

The source includes the following clarification remark: SOURCE IS COMPOSED OF 3 UNDEVELOPED SPRINGS. This should be removed and replaced with: SOURCE IS COMPRISED OF VARIOUS SEEPS AND SPRINGS COLLECTED IN PIONEER DITCH ALONG ITS COURSE.

The Preliminary Decree states that the point of diversion and place of use are:

| <u>QTRSEC</u> | <u>SEC</u> | <u>TWP</u> | <u>RGE</u> | <u>COUNTY</u> |
|---------------|------------|------------|------------|---------------|
| | 13 | 1N | 14E | SWEET GRASS |
| | 16 | 1N | 15E | SWEET GRASS |
| | 17 | 1N | 15E | SWEET GRASS |
| | 18 | 1N | 15E | SWEET GRASS |
| | 20 | 1N | 15E | SWEET GRASS |
| | 21 | 1N | 15E | SWEET GRASS |
| | 22 | 1N | 15E | SWEET GRASS |
| | 27 | 1N | 15E | SWEET GRASS |
| | 28 | 1N | 15E | SWEET GRASS |

The point of diversion and place of use should be:

| <u>QTRSEC</u> | <u>SEC</u> | <u>TWP</u> | <u>RGE</u> | <u>COUNTY</u> |
|---------------|------------|------------|------------|---------------|
| SWSW | 13 | 1N | 14E | SWEET GRASS |
| E2 | 23 | 1N | 14E | SWEET GRASS |
| NWNWNW | 24 | 1N | 14E | SWEET GRASS |

The remarks concerning the claim not appearing in the Basin 43B Temporary Preliminary Decree should be removed as having served its notice purpose.

The remark concerning changes made during the Basin 43BJ Temporary Preliminary Decree proceedings provides notice of these events. It should stay on the abstract to provide that notice in the future Basin 43BJ Preliminary Decree.

The Preliminary Decree for this claim also includes the following other remarks:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK DRAINAGE (BASIN 43B) AND USES IT IN THE YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK DRAINAGE (BASIN 43B) AND THE BOULDER RIVER, TRIBUTARY TO YELLOWSTONE RIVER DRAINAGE (BASIN 43BJ). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER THE POINT OF DIVERSION OR PLACE OF USE BASIN.

LIVESTOCK HAVE HISTORICALLY WATERED FROM THE PIONEER DITCH AT PLACES OF USE AND POINTS OF DIVERSION LISTED ABOVE. PIONEER DITCH BISECTS SPRINGS AT THE FOLLOWING LOCATIONS E2 SEC 23 TWP 01N RGE 14E SWEETGRASS CO NWNWNW SEC 24 TWP 01N RGE 14E SWEETGRASS CO SESE

SEC 13 TWP 01N RGE 14E SWEETGRASS CO THESE SPRINGS CONTRIBUTE TO A YEAR ROUND FLOW IN PIONEER DITCH, THE SOURCE OF STOCKWATER FOR THIS CLAIM.

With the above changes to the point of diversion and place of use, this claim now only includes the diversions and uses within Basin 43BJ. This claim no longer involves an interbasin transfer of water. The interbasin transfer remark should be removed as no longer relevant. The second remark should be removed as redundant because all of its information is incorporated into the elements on the abstract of claim.

2. For claim 43B 212247-00, the type of historical right is USE. The type of historical right issue remark should be removed as addressed and resolved.

The following clarification remark should be added to the source: SOURCE IS COMPRISED OF VARIOUS SEEPS AND SPRINGS COLLECTED IN PIONEER DITCH ALONG ITS COURSE. With the addition of this remark, the long remark identifying each spring (all of which are included in the point of diversion) is now redundant and should be removed. The source issue remark should be removed as addressed and resolved.

The point of diversion and place of use for this claim match that stated in the 1988 Master's Report and describe only the portion of Pioneer Ditch which flows within the boundaries of Basin 43B. Neither of these elements should be changed.

The remark concerning the changes made during the Basin 43BJ Temporary Preliminary Decree proceedings provides notice of these changes. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The information in the claim file, particularly the 1988 Master's Report and 2018 marked aerial photograph, and the information provided by the claimant is sufficient to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served

with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

Courtesy Copy (This Order Only):

Kirk Johnston
22 Hwy 10 E.
Big Timber MT 59011

Service Via Electronic Mail:

Pioneer Ditch Co.
PO Box 201
Big Timber, MT 59011
bigtimberpioneeditch@gmail.com
kjohnston@acvsmt.com
arlianconstruction@hotmail.com

\\JUDHLNSRV-DATA\SHARE\JUDGALH2OSRV (DATAVOL)\SHARE\WC-BASIN FOLDERS\43B PD\43B CASES\899R\899R MR 7-12-23 SJS FOR JBC.DOCX

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BOULDER RIVER, TRIBUTARY TO YELLOWSTONE RIVER
BASIN 43BJ

Water Right Number: 43BJ 23172-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: PIONEER DITCH CO
PO BOX 201
BIG TIMBER, MT 59011

Priority Date: APRIL 15, 1893

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name:** UNNAMED TRIBUTARY OF YELLOWSTONE RIVER

Source Type: SURFACE WATER

SOURCE IS COMPRISED OF VARIOUS SEEPS AND SPRINGS COLLECTED IN PIONEER DITCH ALONG ITS COURSE.
ALSO KNOWN AS PIONEER DITCH

***Point of Diversion and Means of Diversion:**

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------------------------|------------------------------|------------|------------|------------|------------|---------------|
| 1 | | SWSW | 13 | 1N | 14E | SWEET GRASS |
| Period of Diversion: | JANUARY 1 TO DECEMBER 31 | | | | | |
| Diversion Means: | LIVESTOCK DIRECT FROM SOURCE | | | | | |
| 2 | | E2 | 23 | 1N | 14E | SWEET GRASS |
| Period of Diversion: | JANUARY 1 TO DECEMBER 31 | | | | | |
| Diversion Means: | LIVESTOCK DIRECT FROM SOURCE | | | | | |
| 3 | | NWNWNW | 24 | 1N | 14E | SWEET GRASS |
| Period of Diversion: | JANUARY 1 TO DECEMBER 31 | | | | | |
| Diversion Means: | LIVESTOCK DIRECT FROM SOURCE | | | | | |
| Period of Use: | JANUARY 1 TO DECEMBER 31 | | | | | |

Place of Use:

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|--------------|-----------------|------------|------------|------------|------------|---------------|
| 1 | | | SWSW | 13 | 1N | 14E | SWEET GRASS |
| 2 | | | E2 | 23 | 1N | 14E | SWEET GRASS |
| 3 | | | NWNWNW | 24 | 1N | 14E | SWEET GRASS |

Remarks:

IMPLIED CLAIM NO. 43B 212247-00 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

STARTING IN 2008, PERIOD OF DIVERSION WAS ADDED TO MOST CLAIM ABSTRACTS, INCLUDING THIS ONE.

THE FOLLOWING POTENTIAL ISSUES WERE IDENTIFIED DURING CLAIMS EXAMINATION OR DURING PREVIOUS WATER COURT PROCEEDINGS.

THE SOURCE, POINT OF DIVERSION AND MEANS OF DIVERSION HAVE BEEN CHANGED EVEN THOUGH NOT OBJECTED TO THEREFORE THEY WILL BE SUBJECT TO OBJECTIONS AT THE PRELIMINARY DECREE. THE TIMELY FILED OBJECTION OF PIONEER DITCH CO WAS AMENDED BY PIONEER DITCH CO TO INCLUDE SOURCE, POINTS OF DIVERSION, AND MEANS OF DIVERSION. BECAUSE THESE ELEMENTS WERE NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 212247-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: PIONEER DITCH CO
PO BOX 201
BIG TIMBER, MT 59011

***Priority Date:** APRIL 15, 1893

***Type of Historical Right:** USE

***Purpose (use):** STOCK

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

***Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name:** UNNAMED TRIBUTARY OF YELLOWSTONE RIVER

Source Type: SURFACE WATER

SOURCE IS COMPRISED OF VARIOUS SEEPS AND SPRINGS COLLECTED IN PIONEER DITCH ALONG ITS COURSE.
ALSO KNOWN AS PIONEER DITCH

***Point of Diversion and Means of Diversion:**

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|--|-----------------|------------|------------|------------|------------|---------------|
| 1 | | | 13 | 1N | 14E | SWEET GRASS |
| Period of Diversion: JANUARY 1 TO DECEMBER 31 | | | | | | |
| Diversion Means: LIVESTOCK DIRECT FROM SOURCE | | | | | | |
| 2 | | | 16 | 1N | 15E | SWEET GRASS |
| Period of Diversion: JANUARY 1 TO DECEMBER 31 | | | | | | |
| Diversion Means: LIVESTOCK DIRECT FROM SOURCE | | | | | | |
| 3 | | | 17 | 1N | 15E | SWEET GRASS |
| Period of Diversion: JANUARY 1 TO DECEMBER 31 | | | | | | |
| Diversion Means: LIVESTOCK DIRECT FROM SOURCE | | | | | | |
| 4 | | | 18 | 1N | 15E | SWEET GRASS |
| Period of Diversion: JANUARY 1 TO DECEMBER 31 | | | | | | |
| Diversion Means: LIVESTOCK DIRECT FROM SOURCE | | | | | | |
| 5 | | | 20 | 1N | 15E | SWEET GRASS |
| Period of Diversion: JANUARY 1 TO DECEMBER 31 | | | | | | |
| Diversion Means: LIVESTOCK DIRECT FROM SOURCE | | | | | | |
| 6 | | | 21 | 1N | 15E | SWEET GRASS |

Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
7 22 1N 15E SWEET GRASS

Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
8 27 1N 15E SWEET GRASS

Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
9 28 1N 15E SWEET GRASS

Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE

***Period of Use:** JANUARY 1 TO DECEMBER 31

***Place of Use:**

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|--------------|-----------------|------------|------------|------------|------------|---------------|
| 1 | | | | 13 | 1N | 14E | SWEET GRASS |
| 2 | | | | 16 | 1N | 15E | SWEET GRASS |
| 3 | | | | 17 | 1N | 15E | SWEET GRASS |
| 4 | | | | 18 | 1N | 15E | SWEET GRASS |
| 5 | | | | 20 | 1N | 15E | SWEET GRASS |
| 6 | | | | 21 | 1N | 15E | SWEET GRASS |
| 7 | | | | 22 | 1N | 15E | SWEET GRASS |
| 8 | | | | 27 | 1N | 15E | SWEET GRASS |
| 9 | | | | 28 | 1N | 15E | SWEET GRASS |